78-449

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CATHY ANN STEVENS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a-35a) is reported at 448 F. Supp. 1313.

JURISDICTION

The order of the district court declaring unconstitutional part of 42 U.S.C. (1970 ed. and Supp. V) 607 and ordering the defendants to provide Aid to

Families with Dependent Children—Unemployed Fathers benefits to plaintiff class without regard to the sex of the unemployed parent was entered on April 19, 1978 (App. A, *infra*, pp. 1a-35a). A notice of appeal to this Court was filed on May 18, 1978 (App. B, *infra*, pp. 36a-37a). On July 10, 1978, Mr. Justice Stewart extended the time for docketing the appeal to and including August 16, 1978, and on August 8, 1978, he further extended the time to and including September 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975).

QUESTION PRESENTED

Whether Section 407 of the Social Security Act, which provides AFDC benefits to two-parent families in which a dependent child has been deprived of parental support because of the unemployment of his father but does not provide benefits when the mother becomes unemployed, is consistent with the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

Section 407 of the Social Security Act, 42 U.S.C. (1970 ed. and Supp. V) 607, is set forth in App. C, *infra*, pp. 40a-43a.

STATEMENT

1. The Aid to Families with Dependent Children (AFDC) program, 42 U.S.C. (1970 ed. and Supp. V) 601 *et seq.*, provides financial assistance to families with needy dependent children. If a state elects to participate in the program, it must comply with the requirements set forth in 42 U.S.C. (Supp. V) 602 (a) and the applicable federal regulations, and its plan must be approved by the Secretary of Health, Education, and Welfare in order for the state to qualify for federal reimbursement for a percentage of its expenditures. 42 U.S.C. (1970 ed. and Supp. V) 602-603. If a state that participates in the AFDC program also participates in the Medicaid program, persons who receive AFDC benefits are entitled to receive Medicaid benefits. 42 U.S.C. (Supp. V) 1396a(a)(10).

The AFDC program benefits are intended to assist needy "dependent" children. The program originally was limited to children who were needy or had been deprived of the support of one parent because of death, absence, or incapacity. 42 U.S.C. 606(a); *Batterton* v. *Francis*, 432 U.S. 416, 418 (1977). The Act now also provides assistance to certain families where both parents are present and neither is disabled. Section 407(a) of the Act, 42 U.S.C. 607(a), defines the term "dependent child" to include a "needy child * * * who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Sec-

retary) of his father * * *." This portion of the program is known as Aid to Families With Dependent Children—Unemployed Father ("AFDC-UF"). Although every state participates in the AFDC program, only 26 states (and the District of Columbia) participate in the AFDC-UF program. Ohio participates in the AFDC-UF program. See Ohio Rev. Code Ann. § 5107.03 (Page 1977 Supp.).[1]

2. On January 27, 1977, the Ohio Department of Public Welfare advised appellee Cathy Stevens, who is married and has one daughter, that her family was ineligible for AFDC-UF benefits because her husband, although out of work, did not have a sufficient work history to qualify as an "unemployed" father. On May 6, 1977, the Department of Public Welfare informed appellee Rosalie McRoberts, who is married and has two children, that her family was not eligible for AFDC-UF benefits because of her husband's insufficient work history.

Appellees then instituted this class action in the United States District Court for the Northern District of Ohio, naming as defendants the Secretary of Health, Education, and Welfare and the Director of the Ohio Department of Public Welfare (App. A, *infra*, p. 2a). Appellees contended that Section 407 of the Social Security Act and the implementing state regulations discriminate on the basis of gender in violation of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Appellees sought declaratory and injunctive relief extending the AFDC-UF program to families where the mother was unemployed.

[1] Although § 5107.03(A) refers to needy children deprived of parental support by reason of the unemployment of either "parent," it also limits aid to that provided pursuant to a plan approved by the Secretary of Health, Education, and Welfare. Consistent with Section 407, the Ohio plan makes benefits available only to families where the father is unemployed. Ohio Public Assistance Manual (OPAM) § 314.3.

The parties stipulated that appellees' families would have been eligible for AFDC-UF benefits but for the fact that the mother, rather than the father, met the requirements of "unemployment." The mother in each family is unemployed and has a work history sufficient to meet the federal and state tests of eligibility that are applied to fathers.

The district court certified the case as a class action under Fed. R. Civ. P. 23(b), defining the class as all Ohio residents who are now or have been denied AFDC-UF benefits pursuant to Section 407 and who would be eligible but for the statutory requirement that the unemployed parent be the father (App. A, *infra*, p. 2a).[2]

On the merits, the district court concluded that Section 407 creates a gender-based classification and that in order to withstand constitutional challenge

[2] After certifying the class the district court permitted appellee Sonya Smith to intervene (App. A, *infra*, p. 1a n.1). On April 1, 1977, the Department of Public Welfare notified Smith that her family was ineligible for AFDC-UF benefits because her husband, although out of work, did not have a sufficient work history.

that classification "'must serve important governmental objectives and must be substantially related to achievement of those objectives'" (App. A, *infra*, p. 8a, quoting from *Craig* v. *Boren*, 429 U.S. 190, 197 (1976)). The court reviewed the legislative history and determined (App. A, *infra*, pp. 15a-18a) that Congress intended the gender-based distinction in Section 407 to eliminate benefits for families where the breadwinner was fully employed. The court concluded (*id.* at 18a) that "[i]t can be assumed * * * that Congress simply presumed that there were so few families which were dependent upon the earnings of the female parent, that it was unnecessary to provide aid to such families when the female parent became unemployed." Under *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), the court reasoned, this presumption is insufficient to justify a gender-based distinction. The court also found that the gender classification does not eliminate the motivation for fathers to desert their families so that they could qualify for aid, because desertion by fathers would make families eligible where the mother, who had been the breadwinner, became unemployed (*id.* at 22a). Accordingly, the court held that Section 407 violates the Due Process Clause of the Fifth Amendment.[3]

The district court ordered the defendants to provide AFDC-UF benefits to needy families with unemployed mothers on the same basis as they were provided to the families with unemployed fathers (App. A, *infra*, p. 28a). The court denied appellees' claim for benefits that would have been paid but for the gender classification in Section 407, finding retroactive relief inappropriate under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) (App. A, *infra*, pp. 26a-27a). The court reserved the question of attorneys fees, and accordingly entered an injunction but not a final judgment (*id.* at 28a-29a). On July 3, 1978, the district court granted appellees' motion for attorneys fees against the state defendant but denied the motion as applied to the Secretary, and it entered its final judgment declaring Section 407 unconstitutional and enjoining its enforcement (App. D, *infra*, pp. 44a-45a).

[3] The court also held that the implementing federal regulation, 45 C.F.R. 233.100, violates the Due Process Clause and that the state regulation, OPAM § 5101.02, violates the Equal Protection Clause of the Fourteenth Amendment (App. A, *infra*, pp. 22a-23a).

THE QUESTION IS SUBSTANTIAL

This case involves the same statute, and the same constitutional question, as *Califano* v. *Westcott*, in which we have recently filed a jurisdictional statement.[4] For the reasons stated in that jurisdictional statement, the constitutional question should be given plenary review by this Court.

[4] We have furnished a copy of the jurisdictional statement in *Westcott* to counsel for appellees in this case.

CONCLUSION

The appeal should be held pending the Court's decision in *Califano* v. *Westcott*, *supra*, and then disposed of as appropriate in light of that decision. In the alternative, probable jurisdiction should be noted and this case should be consolidated for argument with *Califano* v. *Westcott*.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C77-103A

[Filed April 19, 1978]

CATHY ANN STEVENS, ET AL., PLAINTIFFS

vs.

JOSEPH A. CALIFANO, JR., ET AL., DEFENDANTS

ORDER

Invoking the Court's jurisdiction under 28 U.S.C. §§ 1331, 1343(3) and (4), and 1361, plaintiffs initiated this action to redress alleged deprivations of their constitutional rights. This case is presently before the Court upon the parties' cross motions for summary judgment and certain stipulations of fact.

I. *PARTIES*

The named plaintiffs and plaintiff intervenor[1] are indigent residents of the State of Ohio who have applied for and been denied benefits under the Aid to Families with Dependent Children-Unemployed

[1] The Court granted plaintiff intervenor Sonya Smith's motion to intervene on December 8, 1977.

Fathers program (AFDC-U). On November 11, 1977, the Court granted plaintiffs' motion to certify this action as a class action pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure. Plaintiffs' class consists of:

> All persons in the State of Ohio who have in the past or who are presently being denied Aid to Families with Dependent Children—Unemployed Fathers benefits in compliance with the provisions of Section 407 of the Social Security Act of 1935, 42 U.S.C. § 607, and the regulations promulgated thereunder, and who would be eligible for assistance under said program but for the sex of the unemployed parent.

Defendants in the present action are the Secretary of the Department of Health, Education and Welfare, Joseph A. Califano, Jr., individually and in his official capacity, and the Director of the Ohio Department of Public Welfare, Kenneth Creasy, individually and in his official capacity.

II. *FACTS*

The Aid to Families with Dependent Children (AFDC) program was first established in 1935. Said program provided benefits to families with a needy child:

> (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment; . . .

Social Security Act of 1935 § 406, 42 U.S.C. § 606.

The present action involves the constitutionality of Section 407 of the Social Security Act, 42 U.S.C. § 607 (hereinafter Section 607), which enlarges the above quoted definition to include families with a needy child:

> . . . who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father.[2]

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[2] The full text of 42 U.S.C. § 607(a) is as follows:

> The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

In essence, Section 607 enlarges a program which would only include one-parent families to include certain two-parent families. The two parent families so included are families of unemployed fathers. Plaintiffs claim that inasmuch as Section 607 permits needy families to qualify for benefits based upon the unemployment of the male parent but not upon the unemployment of the female parent, it violates the Due Process Clause of the Fifth Amendment.

Plaintiffs further contend that the regulation promulgated in furtherance of the Act, 45 C.F.R. § 233.100, "Dependent Children of Unemployed Fathers," is also violative of the Due Process Clause of the Fifth Amendment. Said regulation, written and administered by the Secretary of the Department of Housing, Education and Welfare, outlines the requisites that a state Aid to Families with Dependent Children—Unemployed Fathers (AFDC-U) program must meet to receive federal funding.[3] The regulation provides that funding is available for programs that furnish aid to families with unemployed fathers, but does not make any provision for aid to families with unemployed mothers.

The individual States are not required to participate in the AFDC-U program. If they choose to so participate, however, the provisions of Section 607 and Section 233.100 are mandatory.

The State of Ohio has chosen to participate in the federal AFDC-U program and has done so by enact-

[3] For the text of Section 233.100(c), see Appendix A.

ment of Chapter 5107 of the Ohio Revised Code. Chapter 5107, is not presently in issue.[4] The regulations implementing Chapter 5107, however, are in issue. Said regulations, Ohio Public Assistance Manual (OPAM) § 314.3, were issued by the Ohio Department of Public Welfare.[5] Pursuant to Section 314.3, benefits are made available only to families of unemployed fathers. Plaintiffs contend Section 314.3 is violative of the Equal Protection Clause of the Fourteenth Amendment.

The current Ohio Plan for AFDC-U benefits has been approved by the Secretary of the Department of Housing, Education and Welfare and is presently being implemented through the Director of the Ohio Department of Public Welfare in accordance with 42 U.S.C. §§ 601-610, 45 C.F.R. § 233.100, and OPAM § 314.3.

To be eligible to receive benefits pursuant to the AFDC-U program a family must meet a number of requirements. First, a family must include a "needy dependent" child or children. The individual States define needy for the purposes of the AFDC-U program. Second, the father must be "unemployed." Un-

[4] Chapter 5107 does not, on its face, contain a gender-based classification. Chapter 5107.03, however, incorporates the classification found in 42 U.S.C. § 607. For the text of Chapter 5107.03, see Appendix B.

[5] Ohio Public Assistance Manual Section 314.3 provides in part:

> Work history requirement in ADC-U must be determined at every application. The male parent shall have established a prior connection with the labor force . . . .

employed is defined by 45 C.F.R. 233.100 as being "employed less than 100 hours a month." Third, the father must have a recent connection with the workforce.[6] The plaintiffs in the present action, but for the sex of the unemployed parent, would qualify for benefits under the AFDC-U program.

Ohio residents who qualify for AFDC-U benefits, in addition to receiving monthly payments under said program, are automatically eligible to receive Medicaid assistance.[7] If a family which received AFDC-U benefits for at least three months is no longer eligible because of the re-employment of the father, said family nevertheless remains eligible for Medicaid benefits for an additional four months.

By the present action, plaintiffs seek essentially three types of relief: a declaratory judgment that the AFDC-U program, as presently implemented, is violative of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment; a mandatory injunction requiring inclusion of plaintiffs, and the class they represent, within the AFDC-U program; and recovery of their attorneys' fees and the costs incurred in bringing this action.

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[6] This requirement is found at 42 U.S.C. § 607(b). For the text of Section 607(b), see Appendix C.

[7] This is mandated by Ohio Public Assistance Manual Section 370.1. For the text of Section 370.1, see Appendix D.

III. *DISCUSSION*

A

As found above, the AFDC-U program provides benefits to families with an unemployed father who has the requisite attachment to the workforce, but not to families with an unemployed mother with the same attachment to the workforce. It is clear, therefore, that the legislation "establishes a classification subject to scrutiny under the Equal Protection Clause." *Reed* v. *Reed*, 404 U.S. 71, 75, 92 S.Ct. 251, 253 (1971).[8]

Not all classifications subject to scrutiny under the Equal Protection Clause, however, are invalid. Fur-

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[8] As outlined previously, the plaintiffs allege that section 607 and the federal regulation violate the Fifth Amendment and that the state regulation violates the Fourteenth Amendment:

> "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); see also *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. See, *e.g.*, *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Jimenez* v. *Weinberger*, 417 U.S. 628, 637 (1974); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

Weinberger v. *Wiesenfeld*, 420 U.S. 636, 638 n. 2, 95 S. Ct. 1225, 1228 n. 2 (1975).

It is apparent that the two regulations under discussion must survive or fail scrutiny based upon whether the statute under discussion survives or fails scrutiny. The Court, therefore, will restrict its analysis to scrutiny of section 607.

ther, some classifications are more obnoxious than others. More obnoxious classifications are subjected to closer scrutiny than less offensive classifications. See *Craig* v. *Boren*, 429 U.S. 190, 97 S.Ct. 451, 464-65 (Stevens, J. concurring). For example, classifications based on race are subject to "strict scrutiny" whereas most classifications are subject only to a "rational basis test." Classifications based upon sex are less offensive than classifications based on race but more obnoxious than classifications based upon such things as intelligence or physical ability. Gender-based classifications, therefore, are subjected to a test more stringent than the "rational basis test" but less stringent than "strict scrutiny." The Supreme Court, in *Craig* v. *Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457 (1976), adopted a two-pronged "middle test" for gender-based classifications: "To withstand constitutional challenge, previous cases establish that classifications must serve important governmental objectives and must be substantially related to achievement of those objectives." See also *Califano* v. *Webster*, 430 U.S. 313, 97 S.Ct. 1192 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021 (1977); but see *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973).

Defendants appear to argue that if the Court concludes that Section 607 creates a gender-based classification, said classification, because of its context as part of a social welfare program, should be subjected to less scrutiny than it would be if found in some other context:

> As with any standard of review, the *Craig* test is not capable of being applied in a hard and fast manner. Rather, its application must be adapted to the statutory scheme in which the alleged discrimination arises, *e.g.*, a comprehensive social welfare program to aid dependent children.

Defendant Califano's Memorandum in Support of Motion for Summary Judgment 3.

The Supreme Court considered a similar argument in *Califano* v. *Goldfarb*, *supra*. In *Goldfarb*, the Court said that it is true that Congress has wide latitude to create classifications under social welfare programs. The Court further stated, however:

> But this "does not, of course, immunize [social welfare legislation] from scrutiny under the Fifth Amendment." . . . The Social Security Act is permeated with provisions that draw lines in classifying those who are to receive benefits. Congressional decisions in this regard are entitled to deference as those of the institution charged under our scheme of government with the primary responsibility for making such judgments in light of competing policies and interests. But "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."

Goldfarb, *supra* at 210-11, 97 S.Ct. at 1028-29 (citations omitted). It is clear, therefore, that if the Court determines that Section 607's classification is gender-

based, it must satisfy *Craig's* "middle test" to survive scrutiny under the Equal Protection Clause. Thus the Court must first determine whether the present classification is gender-based.

Defendants have asserted that the AFDC-U program's classification is not gender-based:

> Although the application of 42 U.S.C. § 607 is triggered by a gender-based classification, its impact falls in a sex-neutral manner on beneficiaries of the AFDC program: the application or non-application of benefits is without regard to whether the dependent children are male or female. *See generally*, 42 U.S.C. § 601: Moreover, benefits are provided or denied to the entire family, including parents and children, irrespective of their sex if the family qualifies for AFDC-U benefits.

Defendant Califano's Memorandum in Support of Motion for Summary Judgment 9 n.*. In other words, defendants would have the Court examine the AFDC-U program from the standpoint of the ultimate beneficiaries rather than from the standpoint of the parent who qualifies said beneficiaries.

In *Goldfarb, supra*, the Supreme Court considered the constitutionality of the Social Security Act's survivors' benefits. Under said program benefits based on the earnings of a deceased husband covered by the Act were payable to his widow regardless of dependency, but such benefits on the basis of the earnings of a deceased wife were payable to her widower only if he had been receiving half his support from her.

The Court found that the distinction under consideration deprived "women of protection for their families which men receive as a result of their employment." *Goldfarb, supra* at 206, 97 S.Ct. at 1026. The defendant in *Goldfarb*, however, argued that the Court's analysis of the equal protection question should focus:

> not upon the discrimination against the covered wage earning female, but rather upon whether her surviving widower was unconstitutionally discriminated against by burdening him but not a surviving widow with proof of dependency. The gist of the argument is that, analyzed from the perspective of the widower "the denial of benefits reflected the congressional judgment that aged widowers as a class were sufficiently likely not to be dependent upon their wives that it was appropriate to deny them benefits unless they were in fact dependent."

Goldfarb, supra at 207, 97 S.Ct. at 1027. In rejecting defendant's argument, the Court stated:

> From its inception, the social security system has been a program of social insurance. Covered employees and their employers pay taxes into a fund administered distinct from the general federal revenues to purchase protection against the economic consequences of old age, disability, and death. But under § 402(f)(1)(D) female insureds received less protection for their spouses solely because of their sex. Mrs. Goldfarb worked and paid social security taxes for 25 years at the same rate as her male colleagues, but because of § 402(f)(1)(D) the insurance protection re-

> ceived by the males was broader than hers. Plainly then § 402(f)(1)(D) disadvantages women contributors to the social security system as compared to similarly situated men. The section then "impermissibly discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical." . . . In a sense, of course, both the female wage earner and her surviving spouse are disadvantaged by operation of the statute, but this is because "Social Security is designed . . . for the protection of the *family*," . . . and the section discriminates against one particular category of family—that in which the female spouse is a wage earner covered by social security. Therefore decision of the equal protection challenge in this case cannot focus solely on the distinction drawn between widowers and widows but, as *Wiesenfeld* held, upon the gender-based discrimination against covered female wage earners as well.

Goldfarb, supra at 208-09, 97 S.Ct. at 1027-28 (citations and footnotes omitted) (emphasis in original).

There is no requirement that a parent contribute to the Social Security program in order to qualify his family for AFDC-U benefits. There is, however, a requirement that the parent has formerly been employed. AFDC-U benefits flow indirectly from that former employment. As presently structured, the AFDC-U program permits a male parent, by his employment, to provide protection for his family that a female parent cannot provide. The section then

"discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical."

Having concluded that the subject classification is gender-based, the Court must determine whether the classification was intended "to serve important governmental objectives" and, if so, whether it is "substantially related to the achievement of those objectives."

Title IV of the Social Security Act of 1935, 42 U.S.C. §§ 601-610, created the AFDC program. The program was originally enacted to assist certain needy children. It was not intended, however, to assist all needy children. See *King* v. *Smith*, 392 U.S. 329, 88 S.Ct. 2128 (1968). It was enacted to provide aid to children of families in which there was no one capable of being a "breadwinner:"

> Many of the children included in relief families present no other problem than that of providing work for the bread winner of the family. These children will be benefited from the work relief program and still more through the revival of private industry. But there are large numbers of children in relief families which will not be benefited through work program or the revival of industry.
>
> These are the children and families which have been deprived of a father's support and in which there is no other adult than the one who is needed for the care of the children. These are prin-

> cipally families with female heads who are widowed, divorced, or deserted.

S. Rep. No. 628, 79th Cong., 1st Sess., 17 (1935).

It is clear that Congress' decision to extend AFDC benefits only to children in one parent families was based, at least in part, on their confidence that the problem of needy children in families with two unemployed parents would be remedied by other programs. In 1961, however, Congress adopted 42 U.S.C. § 607, which created the AFDC-U program. The AFDC-U program was designed to provide funds to dependent children who were needy because of the unemployment of a parent. Section 607 was originally established as a temporary program. It was, however, extended a number of times and, in 1968, was made permanent.

As originally enacted, Section 607 defined a "needy dependent child" for purposes of the AFDC-U program as one who "has been deprived of parental care by reason of the unemployment of *a parent*." (Emphasis added). As is obvious, the statute in its original form did not contain a gender-based classification; it also did not require that the unemployed parent have a connection with the workforce to qualify his family for AFDC-U benefits.

In 1968, Congress amended Section 607 to correct what it viewed as flaws in the program. One amendment removed the authority to define "unemployed" from the individual States and placed it in the Secretary of the Department of Housing, Education and

Welfare. This amendment was deemed necessary because the various definitions of "unemployment" adopted by the States "worked to the detriment of the program . . . . In some instances, the definitions [were] very narrow so that only a few people [were] helped. In other States, the definitions [went] beyond anything that Congress originally envisioned." H. Rep. No. 544, 90th Cong., 1st Sess., 108 (1967).

A second problem with the AFDC-U program as originally established was described as follows: "This program was originally conceived as one to provide aid for the children of unemployed fathers. However, some States make families in which the father is working but the mother is unemployed eligible. The bill would not allow such situations. Under the bill, the program could apply only to the children of unemployed fathers." H. Rep. No. 544, 90th Cong., 1st Sess., 108 (1967). To remedy this problem, Section 607 was amended to define "needy dependent child," for purposes of the AFDC-U program, as one who "has been deprived of parental care by reason of the unemployment of *his father*." (Emphasis added).

Congress sought, by the foregoing to make the AFDC-U program conform with its original intent. The legislative history of the original enactment contained the following statement of purpose:

> Your committee's bill, like the House bill, would permit States, for a temporary period, to assist children who are in need because of the unemployment of a parent, with the Federal Gov-

> ment participating to the same extent that it now participates in assistance to children who are in need because of the death, absence, or incapacity of a parent. At present needy families in which the need is occasioned by unemployment are not eligible for any type of assistance in which there is a Federal participation. Under this bill the same formula and the same conditions for Federal participation, with such additional conditions as are appropriate dealing with unemployment, would apply to States wishing to participate. All States, Puerto Rico, Virgin Islands, District of Columbia, and Guam have aid to dependent children programs under title IV of the Social Security Act. These programs afford a base capable of being expanded to include families in which the *breadwinner* is unemployed, if the States wish to expand them.

S. Rep. No. 165, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News 1716, 1716 (emphasis added). It is clear from the above quoted language that Congress did not intend the AFDC-U program to provide aid for working poor. Rather, it intended that the program provide aid to families in which the "breadwinner," or "wage earner" was unemployed. See *Coon* v. *Ohio Dept. of Public Welfare*, Civil No. C75-925 at 14 (N.D. Ohio March 1, 1976). The problem with the program, however, was that the language chosen in the original enactment only required one parent to be unemployed. Inasmuch as the AFDC-U program aided two parent families, said language permitted needy families in which the "breadwinner" was fully employed to receive benefits

based upon the unemployment of the "nonbreadwinner." This problem was aggravated by the fact that before 1968, no prior connection to the workforce was requisite to receipt of benefits. The purpose of the amendment to Section 607, therefore, was to eliminate benefits to families in which the breadwinner was fully employed. As the previously quoted language from the Congressional history indicates, Congress characterized the problem it sought to eliminate in terms of employed fathers and unemployed mothers. It is clear, however, that the original statute also allowed for the opposite situation. A family in which the mother was working and the father was unemployed would be eligible for benefits.

The 1968 amendment to Section 607 eliminated participation in the AFDC-U program by needy families in which the father was employed and the mother was unemployed. Congress did not, however, take any action to eliminate participation by needy families in which the mother was fully employed and the father was unemployed. The legislative history does not reveal that Congress even considered this type of untraditional family in which the female breadwinner was fully employed. It is possible, however, that Congress concluded that there were so few such families in which the female breadwinner was employed and the male nonbreadwinner was qualifying the family for benefits, that it was not necessary to eliminate them from participation. Plaintiffs, of course, do not complain of this "underinclusiveness" of the method by which Congress chose to eliminate

what it saw as an abuse. Rather, they complain because the language Congress chose to eliminate participation by families in which the male "breadwinner" was employed, also eliminated benefits to untraditional families in which the female was the breadwinner and was unemployed. Again, the legislative history does not indicate that Congress was cognizant of the amendment's "overinclusiveness." It can be assumed, however, that Congress simply presumed that there were so few families which were dependent upon the earnings of the female parent, that it was unnecessary to provide aid to such families when the female parent became unemployed.

It appears, therefore, that Congress amended Section 607 based upon the "generally accepted presumption that a man is responsible for the support of his wife and children," *Wiesenfeld, supra* at 654, 95 S.Ct. at 1231, and the correspondent presumption that a woman is not so responsible. As the Supreme Court has noted, such a presumption is not without some support:

> Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support . . . But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

Wiesenfeld, supra at 645, 95 S.Ct. at 1231-32. In *Wiesenfeld*, the Court declared that the Constitution

prohibits classifications based upon such presumptions of dependency. Thus, unless another justification for the gender-based classification of Section 607 exists, it cannot withstand scrutiny under the Equal Protection Clause.

C

Defendants assert that there is an important governmental objective which is served by the provision of AFDC-U benefits to families of unemployed fathers which would not be served by the provision of such benefits to families of unemployed mothers. This purpose is the maintenance of the viability of the family as a unit by minimizing the economic incentive for the father to desert as a result of his unemployment. It is clear that such would be an important governmental objective. The Court concludes, however, that the instant gender-based distinction was not intended to further it.

It is true, as defendants assert, that one of Congress' objectives in establishing the AFDC-U program was to remove an incentive for an unemployed breadwinner to desert his family:

> Under the Aid to Dependent Children Program, needy children are eligible for assistance if their fathers are deceased, disabled or family deserters. Too many fathers, unable to support their families, have resorted to real or pretended desertion to qualify their children for help.

H. Rep. No. 28, 87th Cong., 1st Sess. 2 (1961). They further assert that Congress adopted the 1968 amendment to Section 607 based upon a conclusion that this

objective was not furthered by the inclusion of families in which the mother was the breadwinner. The legislative history of the 1968 amendments, however, does not support this assertion.

As defendants state, said legislative history contains the following:

> The Committee is concerned about the effect of the absence of a State program for unemployed fathers has on family stability. Where there is no such program, there is an incentive for an unemployed father to desert his family in order to make them eligible for assistance.

S. Rep. No. 744, 90th Cong., 1st Sess. *reprinted in* [1967] U. S. Code Cong., & Ad. News 2834, 2996. This statement, however, does not appear to be a statement of Congressional purpose for the amendment of the definition of "dependent child." Rather, it appears simply to be a statement of Congress' belief that all of the individual states should participate in either AFDC-U or some similar program.[9] For

[9] That this was the significance of the above quoted statement becomes apparent upon examination of its context:

> The program of benefits for the dependent children of unemployed parents was established on a 1-year basis in 1961, extended for 5 years by the 1962 amendments to the Social Security Act and extended to June 30, 1968, by Public Law 90-36. The program is optional with the States and currently 22 States, including nearly 60 percent of the population of the United States, have programs under the Federal Legislation. Moreover, substantial numbers of similar families not living in those 22 States are receiving assistance under title V of the Economic Opportunity Act.
>
> The committee is concerned about the effect that the absence of a State program for unemployed fathers has on family stability. Where there is no such program there is an incentive for an unemployed father to desert his family in order to make them eligible for assistance. This will be a matter of continuing study by the committee.

S. Rep. No. 744, 9th Cong., 1st Sess. *reprinted in* [1967] U.S. Code Cong. & Ad. News 2834, 2996.

purposes of discussion, however, the Court will accept defendants' assertion that this was a purpose of the gender-based classification under scrutiny, and consider whether said classification is "substantially related to the achievement of [said] objective."

It is clear upon the most cursory examination that the gender-based classification of Section 607 cannot withstand scrutiny based upon this asserted governmental purpose. Defendants argue that:

> Congress sought to remedy the problem of the AFDC program encouraging parents from leaving the family in order to make the family eligible for AFDC benefits by enacting the AFDC-U program. The Congress chose to deal with the largest segment of the family desertion problem, namely the family in which the *father* has deserted to make the family eligible for AFDC benefits.

Defendant Creasy's Memorandum in Support of Motion for Summary Judgment at 4.

The first problem with defendants' asserted justification is that it is based upon the same type of "old notions" upon which presumptions of dependency are

based. Presumptions of dependency are based upon the "old notion" that males are more often breadwinners than are females. The presently asserted justification is based upon the "old notion" that males are more likely to desert their families than are females. It is clear therefore that this asserted justification cannot withstand scrutiny.

The second problem with defendants' asserted justification is even more serious. They argue that provision of benefits to families of unemployed males eliminates the motivation for an unemployed father to desert his family but that provision of such benefits to families of unemployed females would not accomplish the same objective. Such is simply not true. The plaintiffs in the present case are members of families which cannot qualify for AFDC-U benefits because the unemployed parent is female. If, however, the male parent in plaintiffs' families were to desert their families, irregardless of the fact that the female parent is the breadwinner, the families would be eligible for AFDC benefits. It is obvious, therefore, that the provision of benefits to families in which the female parent is the "breadwinner" would accomplish the same important governmental objective which is accomplished for traditional families by the program in its present form.

Based upon the foregoing, the Court concludes that 42 U.S.C. § 607, 45 C.F.R. § 233.100, and OPAM § 5101.02 operate in such a way as to deny plaintiffs, and the class they represent, equal protection of the

law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

IV. *REMEDY*

A

The Court having concluded that the statute and regulations at issue are unconstitutional, plaintiffs are entitled to a declaratory judgment. Therefore, 42 U.S.C. § 607, 45 C.F.R. § 233.100, and OPAM § 5101.02 shall be declared unconstitutional.

B

In view thereof, plaintiffs are entitled to an injunction preventing the continued operation of the AFDC-U program in an unconstitutional manner. While plaintiffs and defendant Califano have urged that if the AFDC-U program were found unconstitutional, defendants should be enjoined to provide benefits to plaintiffs, and the class they represent, defendant Creasy has urged that the Court should enjoin any further payments pursuant to the program.

> Where a statute is defective because of underinclusion there exists two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

Welsh v. *United States*, 398 U.S. 333, 361, 90 S.Ct. 1792, 1808 (Harlan, J. concurring). *Moritz* v. *Com-*

missioner, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906, 93 S.Ct. 2291 (1973).

As with the statute in *Welsh*, the Social Security Act contains a broad separability clause. 42 U.S.C. § 1303.[10] Justice Harlan noted that such a separability clause lends indirect support to extension of an underinclusive statute:

> While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may properly be considered fixed by the legislative pronouncement on severability.

Welsh, *supra* at 364, 90 S.Ct. at 1809 (Harlan, J. concurring).

The proper course in the present case is extension rather than abrogation:

> If an important congressional policy is to be perpetuated by recasting unconstitutional legislation, . . . the analytically sound approach is to accept responsibility for this decision. Its justification cannot be by resort to legislative intent, as that term is usually employed, but by a different kind of legislative intent, namely the presumed grant of power to the courts to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional.

[10] The provisions of 42 U.S.C. § 1303 are as follows:

> If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances shall not be affected thereby.

Welsh, *supra* at 355-56, 90 S.Ct. at 1804 (Harlan, J. concurring). The purpose of the AFDC-U program is to provide benefits for needy children who are needy because of the unemployment of their "breadwinner." Rather than halt payments to families with male breadwinners, it would more nearly accord with Congress' wishes to extend benefits to families with female breadwinners.[11] Accordingly, defendants shall be enjoined, from this date forward, to provide AFDC-U benefits to needy families of unemployed mothers to the same extent as such benefits are pres-

[11] The Court feels that it is necessary to note that the result reached in this Order will not only require the inclusion of needy families with unemployed mothers who have the requisite attachment with the workforce and whose husbands are unemployed, but will also require the inclusion of needy families with unemployed mothers who have the requisite attachment with the workforce and whose husbands are fully employed. The Court realizes that this result makes a program which Congress intended as aid to needy families in which both parents were unemployed available to needy families in which both parents were unemployed available to needy families in which the father is fully employed. The Court further notes two things, however: First, as pointed out earlier in this Order, AFDC-U benefits are already available to needy families with unemployed fathers in which the mother is fully employed; and second, this is a problem which can easily be cured by amending the program to require applicants to prove that both parents are unemployed and at least one parent has the requisite connection with the workforce. Of course, such action is within the province of Congress and not this Court.

ently provided to needy families of unemployed fathers.

In addition to prospective relief, plaintiffs seek an order requiring defendant Califano to pay plaintiffs an amount equal to one hundred per cent of the benefits which would have been paid them in the past but for the invalid gender-based distinction found in Section 607.[12] The Court, however, finds that such relief would be inappropriate.

Section 607 and the federal regulation which this Court has found to be unconstitutional provide funds to the states for AFDC-U benefits. They do not provide for payments directly to needy families. The Court does not believe that it would be within its discretion, in an attempt to cure a denial of equal protection, to order such direct payments.

Further, the Court finds that the facts of the present case are not such that retroactive relief is appropriate. In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971), the Supreme Court indicated three factors which merit consideration in determining whether a judicial decision should be afforded retroactive effect:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was

[12] Retroactive benefits are not requested from the state defendant presumably because of the bar of the Eleventh Amendment to the United States Constitution.

> not clearly foreshadowed, . . . Second it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." . . .

Chevron Oil Co., supra at 106-07, 92 S.Ct. 349 (citations omitted).

Applying these considerations to the facts of the present case leads to the following conclusions. First, although the gender-based distinction of Section 607 has been in effect since 1968, it has never before been held unconstitutional. The present case, therefore, is one of first impression and the Court finds that its resolution was not clearly foreshadowed. Second, the purpose of the AFDC-U program is to provide a monthly income to needy families. That purpose would not be furthered by ordering a lump sum payment of withheld funds especially since some of those payments would be made to families who would no longer be needy. Finally, the Court has determined that retroactive application, while placing an additional burden on an already financially troubled program, would not cure the inequity suffered by plaintiffs. Plaintiffs' past suffering, "however deplorable, cannot be undone." *Rothstein* v. *Wyman*, 467 F.2d 226, 234 (2d Cir., 1972), *cert. denied.*

C

Finally, plaintiffs have requested an award of reasonable attorneys' fees and the costs of bringing this action. The Court, however, finds it impossible to determine the appropriateness of such an award on the present record. See *Huecker* v. *Milburn*, 538 F. 2d 1241 (6th Cir. 1976). The parties shall, therefore, be ordered to submit briefs and whatever documentary evidence they deem appropriate for the resolution of this issue.

V. *CONCLUSION*

Accordingly, the Court hereby declares Section 407 of the Social Security Act of 1935, 42 U.S.C. § 607 unconstitutional as violative of the Due Process Clause of the Fifth Amendment to the United States Constitution; declares 45 C.F.R. § 233.100 unconstitutional as violative of the Due Process Clause of the Fifth Amendment to the United States Constitution; and declares OPAM § 314.3 unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment. Defendants Califano and Creasy are hereby enjoined from this day forward to provide Aid to Families with Dependent Children—Unemployed Fathers benefits to plaintiffs, and the class they represent, to the same extent that said benefits are extended to other needy families similarly situated in all respects but for the sex of the unemployed parent with the requisite connection with the workforce. Finally, plaintiffs are hereby ordered to submit briefs and supporting documentary evidence on the issue of attorneys' fees within ten (10) days of the date of this Order. Defendants shall submit reply briefs and supporting documents within ten (10) days thereafter.

IT IS SO ORDERED.

/s/ Leroy J. Contie, Jr.
LEROY J. CONTIE, JR.
U. S. District Judge

APPENDIX A

Section 233.100(c) provides:

Federal financial participation. (1) Federal financial participation is available in payments authorized in accordance with the State plan approved under section 402 of the Act as aid to families with dependent children with respect to a child.

(i) Who meets the requirements of section 406 (a)(2) of the Act;

(ii) Who is living with any of the relatives specified in section 406(a)(1) of the Act in a place of residence maintained by one or more of such relatives as his (or their) own home;

(iii) Who has been deprived of parental support or care by reason of the fact that his father is employed less than 100 hours a month; or, exceeds that standard for a particular month if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for 2 prior months and is expected to be under the standard during the next month.

(iv) Whose father (a) has six or more quarters of work (as defined in paragraph (a)(3)(iv) of this section) within any 13-calendar-quarter period ending within 1 year prior to the application for such aid, (b) within such 1-year period, received unemployment compensation under an unemployment compensation law of a State or of the United States, or was qualified (under the terms of paragraph (a)(3)(v) of this section) for such compensation under the State's unemployment compensation law, or (c) is an individual whose application for aid was made within the period referred to in paragraph (a)(7) or (8) of this section and who by virtue of the requirements in such paragraph (a)(7) or (8) would be considered to have met the conditions in subdivision (iv)(a) or (b) of this subparagraph; and

(v) Whose father (a) is currently registered with the public employment offices in the State, and (b) with respect to any week, does not receive unemployment compensation under an unemployment compensation law of a State or of the United States.

(2) The State may not include in its claim for Federal financial participation payments made as aid under the plan with respect to a child who meets the conditions set forth in subparagraph (1) of this paragraph, where such payments were made.

(i) For any part of the 30 day period prior to the receipt of such payment, if during such period his father was not unemployed (as defined by the State pursuant to paragraph (a)(1) of this section);

(ii) For such 30-day period, if during such periods his father refused without good cause a bona fide offer of employment or training for employment; and

(iii) For any period beginning with the 31st day after the receipt of such aid, if and for as long as no action is taken during such period to certify his father for participation in the Work Incentive Program as provided in section 402 (a)(19) of the Act and the regulations relating thereto.

APPENDIX B

Chapter 5107.03 provides in part:

> Subject to Chapter 5107. of the Revised Code, and to the availability of revenues for the purposes thereof, a needy child residing in the state shall be entitled to aid if the following conditions are fulfilled:
>
> (A) Such child has been deprived of parental support or care by reason of death, continued absence from the home, or physical or mental incapacity of a parent, or the unemployment of a parent, and is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece in a place of residence maintained by one or more of such relatives as their own home, or is living in a foster family home or child care institution approved by the department of public welfare. As used in this section "unemployment of a parent" means that the parent is either totally or partially unemployed. No aid shall be provided to children who are in need for reason of the unemployment of a parent:
>
> (1) Unless the unemployed parent is physically and mentally capable of engaging in remunerative employment;
>
> (2) Unless the unemployed parent of the needy child registers for employment;
>
> (3) Unless such aid is provided under a plan approved by the department of health, education, and welfare pursuant to the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301 as amended;

APPENDIX C

Section 607(b) provides:

> The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title—
>
> (1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—
>
> (A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,
>
> (B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and
>
> (C)(i) such father has 6 or more quarters of work (as defined in subsection (d)(1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d)(3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; . . .

APPENDIX D

Ohio Public Assistance Manual Section 370.1 provides:

Automatic Eligibility As a Result of Linkage to Federally Reimbursable Need Program

(1) Eligibility for medical services is contingent upon eligibility for financial assistance under ADC, and the determination of eligibility for the latter automatically results in eligibility for Title XIX medical services for:

persons included in the assistance group for the ADC program for the month for which a payment, including a vendor payment, is made;

persons included in the ADC assistance group when the cash grant is withheld only because there is reason to question whether this amount of aid is correct or when the cash grant is reduced to zero to adjust for an overpayment.

(2) Families whose ADC cash grant is terminated because of employment will continue to be eligible for Medicaid for four (4) months:

if the family received and was eligible to receive ADC payments in at least 3 out of the last 6 months before they became *ineligible and*

if the family meets all other ADC eligibility requirements except those re-

garding employment (such as financial need or the ADC-U 100 hour maximum); *and*

only so long as a member of the ADC family is employed throughout the four month period. Continued medicaid coverage begins with the month after the one in which the family is no longer eligible for ADC cash benefits.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C 77-103A

[Filed May 18, 1978]

CATHY ANN STEVENS, ET AL., PLAINTIFFS

—vs—

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252, from the judgment of the District Court entered in this action on April 19, 1978.

Dated at Cleveland, Ohio, this 17th day of May, 1978.

JOSEPH A. CALIFANO, JR.
Secretary of Health,
Education and Welfare
Defendant

/s/ James R. Williams
JAMES R. WILLIAMS
United States Attorney

/s/ Richard J. French
RICHARD J. FRENCH
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400 U. S. Courthouse
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C 77-103A

CATHY ANN STEVENS, ET AL., PLAINTIFFS

—*vs*—

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS

AFFIDAVIT OF SERVICE

COUNTY OF CUYAHOGA)
)ss:
STATE OF OHIO)

RICHARD J. FRENCH, being first duly sworn, on his oath deposes and says:

1. That he is an attorney for the Department of Justice, United States Attorney's Office, Cleveland, Ohio, and an attorney for defendant; and

2. That on the 17th day of May, 1978, he mailed, first class postage prepaid, a copy of the Notice of Appeal to the Supreme Court of the United States filed in the above-styled action to counsel as follows:

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/s/ Richard J. French
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SWORN to before me and subscribed in my presence this 17th day of May, 1978.

/s/ Mary Jo Vantusko
Notary Public

MARY JO VANTUSKO

Notary Public For
Cuyahoga County

My Commission Expires
July 24, 1982

APPENDIX C

Section 407 of the Social Security Act, 75 Stat. 75, as amended, 42 U.S.C. (1970 ed. and Supp. V) 607, provides:

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title.

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C)(i) such father has 6 or more quarters of work (as defined in subsection (d)(1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d)(3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be certified to the Secretary of Labor as provided in section 602(a)(19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b)(1) of this section, or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b)(2) of this section), under the program therein specified, to certify such father to the Secretary of Labor pursuant to section 602(a)(19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar

quarter in which such individual received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 413(a)(2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any other work and training program subject to the limitations in section 609 of this title, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed July 3, 1978]

Civil Action C77-103A

CATHY ANN STEVENS, ET AL., PLAINTIFFS

vs.

JOSEPH A. CALIFANO, JR., ET AL., DEFENDANTS

JUDGMENT ENTRY

The Court having granted plaintiffs' motion for summary judgment and having granted in part and denied in part plaintiffs' motion for assessment of attorneys' fees,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for plaintiffs and against defendants.

IT IS FURTHER ORDERED that Section 407 of the Social Security Act of 1935, 42 U.S.C. § 607 is declared unconstitutional as violative of the Due Process Clause of the Fifth Amendment to the United States Constitution.

IT IS FURTHER ORDERED that 45 C.F.R. § 233.100 is declared unconstitutional as violative of

the Due Process Clause of the Fifth Amendment to the United States Constitution.

IT IS FURTHER ORDERED that OPAM § 314.3 is declared unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

IT IS FURTHER ORDERED that defendants are enjoined to provide Aid To Dependent Children-Unemployed Fathers benefits to plaintiffs, and the class they represent, to the same extent that said benefits are extended to other needy families similarly situated in all respects but for the sex of the unemployed parent with the requisite connection with the workforce.

IT IS FURTHER ORDERED that pursuant to 42 U.S.C. § 1988 the sum of $4,000.00 shall be allowed as costs in this action payable by defendant Creasy in his official capacity. Said sum represents a reasonable attorneys' fee and shall be delivered to plaintiffs' attorneys.

Finally, IT IS FURTHER ORDERED that, with the exception of the item above referenced, defendants shall equally bear the costs of this action.

/s/ Leroy J. Contie, Jr.
LEROY J. CONTIE, JR.
U. S. District Judge

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Supreme Court of the United States

October Term, 1978

No. 78-449

JOSEPH A. CALIFANO, Secretary of Health, Education, and Welfare,
Appellant,

vs.

CATHY ANN STEVENS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

MOTION TO DISMISS OR AFFIRM

The Appellees move the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment and order of the United States District Court on the ground that the question on which the decision of the cause depends is so manifestly insubstantial as not to warrant further argument.

QUESTION PRESENTED

Whether §407 of the Social Security Act, which denies benefits to otherwise eligible needy families, solely because the breadwinner is female, violates the Due Process Clause of the Fifth Amendment?

STATEMENT OF THE CASE

Cathy Stevens, Rosalie McRoberts and Sonja Smith have been the breadwinners in their respective families throughout their employment careers[1]. When circumstances beyond their control led to their unemployment they exhausted all resources available to them and thereafter made application to the Ohio Department of Public Welfare for assistance pursuant to the Aid to Families with Dependent Children-Unemployed Fathers (AFDC-U) program[2]. In both the Stevens and McRoberts cases, the families were seeking medical as well as monetary assistance. This was of special concern to the Stevens family because their daughter was suffering from impetigo and each of the adults faced a potentially serious problem with stomach ulcers. In all three cases the application for assistance was denied because the family breadwinner was the female rather than the male parent. Had Mrs. Stevens', Mrs. McRoberts' or Mrs. Smith's husband had his wife's employment record the family would have been eligible for and would have received AFDC-U benefits. Solely because Cathy Stevens, Rosalie McRoberts and

1. Rosalie McRoberts is a thirty-eight (38) year old beauty salon operator and licensed cosmetologist. She operated her own beauty salon for more than ten (10) years and more recently has been employed as a beautician in shops owned and operated by others. Cathy Stevens is a twenty-two (22) year old career key punch operator with more than four (4) years of employment experience in that field. Sonja Smith is a twenty-three (23) year old medical assistant.

2. The Stevens, McRoberts and Smith families are intact families which do not qualify for Aid to Families with Dependent Children (AFDC) benefits pursuant to any of the provisions of §406 of the Social Security Act, 42 U.S.C. §606, which requires that AFDC assistance be made available only to those families in which a needy dependent child is "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent".

Sonja Smith were the breadwinners in their respective families, all family members were totally excluded from participation in the AFDC-U program.

Faced with absolute exclusion from the AFDC-U program[3], Cathy Stevens and Rosalie McRoberts commenced a class action suit on March 24, 1977, in the United States District Court for the Northern District of Ohio. Appellees sought injunctive and declaratory relief pursuant to allegations that §407 of the Social Security Act, its implementing federal regulation (45 C.F.R. §233.100), and implementing state regulation (Ohio Public Assistance Manual §314.3) were violative of the Fifth and Fourteenth Amendments to the United States Constitution. Subsequently, Sonja Smith moved to intervene in the proceedings. Following certification of the action as a class action, the District Court granted Sonja Smith's motion to intervene. On or about August 11, 1977, Appellees and Appellants cross-moved for summary judgment upon a set of stipulated facts and undisputed factual affidavits.

The facts make clear beyond cavil the operation of the AFDC-U program. The statute authorizing the program, 42 U.S.C. §607, denies federal financial assistance to families with children who are deprived of parental support or care solely because of a mother's unemployment

3. The State of Ohio has in no way endeavored to expand the reach of its AFDC-U program to aid those like appellees not covered under the federal reimbursement scheme. Further, during the pendency of this action no effort was undertaken by the State of Ohio to provide the appellees the equivalent of AFDC-U benefits. These facts distinguish the present action from *Westcott v. Califano*, No. 77-222-F (D. Mass. April 20, 1978) and *Browne v. Califano*, No. 77-1249 (E.D. Penn. June 12, 1978), in which the State of Massachusetts and the State of Pennsylvania undertook ameliorative steps with respect to the litigants by providing them the equivalent of AFDC-U benefits. No such steps were undertaken by the State of Ohio in the present case.

while at the same time providing AFDC-U payments to families with children who are deprived of parental support or care solely because of a father's unemployment[4]. The Secretary of the Department of Health, Education and Welfare has promulgated a regulation to implement 42 U.S.C. §607. This regulation, 45 C.F.R. §233.100, does not permit AFDC-U payments to be made to families with needy children who are deprived of parental support or care solely because of the mother's unemployment. However, it does permit AFDC-U payments to be made to families with needy children who are deprived of parental support or care solely because of the father's unemployment[5].

In order for any state to participate in the federal AFDC-U program it must comply with the requirements set forth in 42 U.S.C. §607 and 45 C.F.R. §233.100[6]. The State of Ohio has chosen to participate in the federal AFDC-U program. This was accomplished by the passage

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4. "3. Under 42 U.S.C. Section 607, Federal financial assistance is not available for ADC-U payments to families with children who are deprived of parental support or care solely because of the mother's unemployment. 42 U.S.C. Section 607 does provide for ADC-U payments to be made to families with children who are deprived of parental support or care solely because of the father's unemployment." Stipulations of Fact filed with the District Court [hereinafter "Stipulations"].

5. "6. 45 C.F.R. Section 233.100 does not permit AFDC-U payments to be made to families with needy children who are deprived of parental support or care solely because of the mother's unemployment. 45 C.F.R. Section 233.100 does permit AFDC-U payments to be made to families with needy children who are deprived of parental support or care solely because of the father's unemployment." Stipulations.

6. "7. States which desire to participate in the AFDC-U program must comply with the mandatory requirements of 42 U.S.C. Sections 601-610, as interpreted and implemented by regulations promulgated by HEW. The AFDC-U program is administered at the state level by the individual state which has great discretion in determining the standard of need and level of benefits for AFDC-U recipients." Stipulations.

of Ohio Revised Code Chapter 5107[7]. The distribution of AFDC-U benefits in Ohio is directly controlled by Ohio Public Assistance Manual regulation §314.3. This regulation, by its wording, limits distribution of AFDC-U assistance to families with "unemployed fathers". It makes no provision for AFDC-U assistance to families with unemployed mothers (Jurisdictional Statement, App. A, p. 5a).

The effect of both federal and state statutes and regulations is that a male breadwinner who meets the requirements qualifies his family for AFDC-U benefits, but a female breadwinner, complying with the same requirements, can never qualify her family for such benefits[8].

In his brief in support of his motion for summary judgment in the District Court, Appellant Califano admitted that §407 relies upon a "gender based distinction" in its operation. He further conceded that such a distinction could only be justified if it were "substantially related to important governmental interests" (Appellant Califano's brief supporting his Motion for Summary Judgment in the District Court, p. 2). The only governmental interests advanced by Secretary Califano in the District Court were

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7. "8. The State of Ohio has chosen to participate in the federal AFDC-U program and has done so by enactment of Chapter 5107 of the Ohio Revised Code. AFDC-U benefits are available in Ohio only under a plan approved by the Secretary of Health, Education and Welfare, Ohio Revised Code, Section 5107.03. . ." Stipulations.

8. "4. In a two-parent family, where both parents are fully capacitated, eligibility for AFDC-U benefits can only be established if based upon the unemployment of the male parent. Eligibility for the AFDC-U program cannot be established if based upon the unemployment of the female parent."

"13. Pursuant to the above enumerated statutes and regulations of the federal government and the State of Ohio, a father complying with the requirements indicated, qualifies his family for AFDC-U benefits, but a mother, complying with these same requirements, cannot qualify her family for these benefits." Stipulations.

"minimizing the economic incentives for desertion of the unemployed father" and "minimization of abuse within a social welfare program" (*Id.*). As to the latter of these, the Appellant expressed a concern exclusively with the situation where states made families "in which the father is working and the mother is unemployed eligible for assistance" (*Id.* at p. 9). At no time during the proceedings in the District Court were other arguments advanced in defense of §407. Appellant Califano further urged that if §407 were found "to be unconstitutional, the proper remedy would be to cover all unemployed parents" (*Id.* at p. 10).

On or about April 19, 1978, the District Court entered its opinion and order. It concluded that §407 established a gender-based classification with respect to the distribution of AFDC-U benefits and that the classification either entirely ignored or denigrated the efforts of female breadwinners. The court rejected the notion that the gender-based classification fixed in §407 served to achieve any legitimate government purpose and particularly noted that the classification was antithetical to family stability. For these reasons the District Court held that §407 violated the Fifth and Fourteenth Amendments to the United States Constitution. As a remedy the court adopted the suggestion of Appellant Califano and enjoined him to provide AFDC-U benefits to Appellees and the class they represented "to the same extent as such benefits are presently provided to needy families of unemployed fathers" (Jurisdictional Statement, App. A, 25a-26a).

On or about May 18, 1978, Appellant Califano filed his Notice of Appeal. Defendant Kenneth Creasy, Director of the Ohio Department of Public Welfare, did not appeal. Ohio has begun making AFDC-U payments in

accordance with the Order of the District Court. On or about July 3, 1978, the District Court filed its Judgment Entry and awarded Appellees their attorneys' fees against Defendant Creasy. Finally, on or about October 25, 1978, Appellant Califano applied in the District Court for a stay pending appeal. This application has yet to be heard.

ARGUMENT

All parties agree that the AFDC-U program established pursuant to §407 of the Social Security Act is premised upon "a distinction on the basis of gender" (Jurisdictional Statement in *Califano v. Westcott*, p. 7).

Despite the clarity of this gender-based classification, Appellant Califano argues that §407 is not "gender-biased", that it "does not discriminate in favor or against either sex" and that it "is not possible to identify a 'loser' on the basis of sex" pursuant to the requirements of the statute (Jurisdictional Statement in *Califano v. Westcott*, pp. 8-9). To say there are no "losers" created by §407 is to engage in a sophistry of the most transparent sort[9]. Each and every female breadwinner who is unemployed is a "loser" pursuant to §407. Not only is she a loser, each member of her intact family is also victimized by §407. The extent of that victimization is complete exclusion from AFDC-U benefits and from the equally crucial Medicaid program. All this is accomplished on the basis of the same kind of sex-role stereotyping which was at issue in *Califano v. Goldfarb*, 430 U.S. 199 (1976); *Wein-*

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9. The Solicitor General appears to have demonstrated a clearer understanding of impermissible gender-based discrimination and the available remedy for such discrimination when, as a circuit judge, he authored the opinion in *Kalina v. Railroad Retirement Board*, 541 F.2d 1204, 1210 (6th Cir. 1976), *aff'd* 431 U.S. 909 (1977).

berger v. Wiesenfeld, 420 U.S. 636 (1975); and *Frontiero v. Richardson,* 411 U.S. 677 (1973).

The appropriate perspective from which to analyze this gender-based classification is from the point of view of the woman who, because of her sex, suffers dissimilar treatment from men who are in all ways, save sex, similarly situated. This was the approach adopted by this Court in *Reed v. Reed,* 404 U.S. 71, 77 (1971) and its progeny and is certainly appropriate in the present action. See, *Weinberger v. Wiesenfeld, supra.*

The standard which most frequently has been applied in the gender-based classification cases, first suggested in *Reed v. Reed, supra,* is that a gender-based classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike". *Reed v. Reed, supra,* 404 U.S. at 76. This heightened or intensified rational basis standard was restated in *Craig v. Boren,* 429 U.S. 190, 197 (1976) ("classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives"). See, *Califano v. Goldfarb, supra; Stanton v. Stanton,* 421 U.S. 1 (1975).

In order to evaluate the validity of the gender-based classification contained in §407, it is necessary to identify the objectives of the AFDC-U program. As all parties agree, AFDC-U was created in 1961 as a consequence of the efforts of the Kennedy administration. While Appellant Califano would have this Court believe that the true objective of that program was to discourage unemployed fathers from deserting their families, an analysis of its history demonstrates that it was primarily intended to assist

in alleviating "the distress arising from the unsatisfactory performance of the economy". President's Message to Congress on Economic Growth and Recovery, 1961 U.S. Code Cong. & Admin. News 1028. To do this, AFDC-U relief was to be provided to families rendered needy by the ravages of unemployment.

The bill originally establishing the AFDC-U program was coupled with other legislation which extended unemployment compensation benefits. The aim of the two bills was delineated by Abraham Ribicoff, then Secretary of the Department of Health, Education and Welfare, in his prepared statement on the matter to the House Committee on Ways and Means.

> This bill would provide a temporary program . . . under which States could provide financial assistance to families in need because of unemployment. It is designed to help the States provide income maintenance to needy families of the unemployed as part of the administration's program to stimulate the national economy and relieve unemployment and hardships resulting therefrom.
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> . . . . .
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> [T]here are many unemployed persons who either do not qualify for unemployment compensation benefits, have exhausted their benefits, or who, due to the size of their families or other special needs, will not receive enough from unemployment compensation to live in health and decency. To meet these needs, a supplemental program with Federal grants to States to assist them in providing payments to the needy families of the unemployed is desirable . . .
>
> The bill would make clear the intention of Congress that the additional Federal Funds provided are for the purpose of making assistance available where it is not now available to needy unemployed families or

of helping to make such assistance sufficient where it is now insufficient in States and localities that are doing something for the unemployed . . .

. . . . .

If the needs of unemployed families are to be met under existing law, the responsibility devolves primarily on the States and localities. While some of these are at least in part attempting to meet the needs of unemployed fathers, the picture is a spotty one. Much remains to be done, and the prospects are poor for substantial increases in State and local outlay.

. . . . .

On the premise that a hungry, ill-clothed child is as hungry and ill-clothed if he lives in an unbroken home as if he were orphaned or illegitimate, the program for aid to dependent children should be expanded to include any financially needy children living with any relative or relatives in a place of residence maintained by one or more of such relatives as his or their own home.

Hearings on H.R. 4884 Before the House Comm. on Ways and Means, 87th Cong., 1st Sess., 94-95 (1961)

Representative Wilbur Mills, the sponsor of the AFDC-U legislation, confirmed that the purpose of the legislation was to provide assistance to families in financial need due to the unemployment of the family breadwinner. In response to an inquiry, Representative Mills set forth the aims of the program.

> Mr. Mills. Let me ask the gentleman: Is there any objection as to justification in the mind of my friend from Iowa for these Federal funds supplementing State funds to take care of the needs of a child whose father may be unemployed, and where the need may arise as a result of the unemployment as there

> is provision for taking care of the needs of a child of another family where the need arises because of the incapacity of the father for physical or mental reasons to satisfy the needs of the child? In this instance we are talking about the incapacity of a parent to supply those needs not because of a physical or mental reasons, but because of inability on the part of a State agency, himself, or anyone else to find him employment that will serve to satisfy those needs. I am talking about the bill in this limited sense for this period of time when we do have as many unemployed people as we do; and because I recognize that only three out of five of those who are in our work force are under what we refer to as covered employment for purposes of unemployment compensation, that two of the five who work are not under the program of unemployment compensation that the States provide. I think a child can be just as much in need because of the parent's not being able to find a job as it can because of the physical condition of a parent that prevents him from working.

107 Cong. Rec. 3761 (1961).

The purpose of the original legislation is also described in the Report to the House Committee on Ways and Means. The Report states:

> The purpose of H.R. 4884 is to make available, during a 15 month period, . . . Federal grants to States wishing to extend their aid to dependent children programs under title IV of the Social Security Act to include needy children (and relatives caring for them) of unemployed parents on the same basis as Federal grants are now available to needy children (and relatives caring for them) who have been deprived of parental support by the death, absence, or incapacity of a parent. . . .

> The bill is intended to provide funds so as to enable States to aid unemployed persons and their children who are not now eligible for aid in which the Federal Government participates. This would be done within the framework and under the matching formula in the present Federal-State aid to dependent children program. It is intended that any additional Federal funds provided as a result of the enactment of this bill are to be made available for assistance (or additional assistance) to needy families, in which the breadwinner is unemployed, where such families either are not now eligible for public assistance or are eligible for public assistance only in amounts insufficient to meet their needs. It is not intended that such funds be substituted for expenditures already being made from State or local funds.

H.R. Rep. No. 28, 87th Cong., 1st Sess., 1, 3 (1961).

From all this the predominant purpose of the original AFDC-U program is easily gleaned. Stated most simply that purpose was to provide assistance to parents whose unemployment has rendered their children needy in a time of economic recession and widespread unemployment. In carrying out that program the focus of both the executive and legislative branches of government was upon the breadwinner who, through no fault of his or her own, was without employment, had exhausted reserves and was ineligible for public assistance.

Appellant Califano would have this Court believe that the motivating objective of the original AFDC-U program was to remove the incentive for an unemployed father to desert his family in order to make them eligible for assistance (Jurisdictional Statement in *Califano v. Westcott*, p. 15). While it is apparent that the issue of "fleeing

fathers" was of concern to the legislators, the original legislation cannot seriously be read to have been intended as a solution for that problem. Appellees contend that no rational argument can be mustered which would demonstrate that the temporary program enacted in 1961 to meet emergent conditions had as its purpose the long-term eradication of the incentive implicit in public assistance programs for unemployed fathers to leave the home.

The fact that both legislators and officers of the executive branch often confused or treated synonymously the terms "breadwinner" and "father" is not supportive of Appellant's position. Rather, it is prima facie evidence that members of both branches of government were involved in sex-role stereotyping by presuming that in all cases fathers are breadwinners and mothers are homemakers. This stereotypical thinking became explicit in 1968 when, in order to exclude from eligibility those families in which only one of two working parents was unemployed,[10] Congress enacted the present version of §407, providing aid only to families where the father was unemployed. While the 1968 amendments were intended to deny AFDC-U payments to families with a fully employed breadwinner[11], this aim was achieved by reliance on the notion that the breadwinner in all families would be the father. Such a presumption swept too broadly. Although the rule barred assistance to families where a breadwinner was fully employed, it also placed an insurmountable barrier before all families in which the mother was the sole breadwinner and through no fault of her own found herself unemployed and without any resources to provide for the

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10. H.R. Rep. No. 544, 90th Cong., 1st Sess., p. 108 (1967); S. Rep. No. 744, 90th Cong., 1st Sess., p. 160 (1967). See also *Stevens v. Califano*, Jurisdictional Statement, App. A, 16a-17a.

11. Far from addressing the question of fleeing fathers, the 1967 amendments to §407 identified this problem as appropriate for continuing study by Congress. S. Rep. No. 744, 90th Cong., 1st Sess., p. 160 (1967).

maintenance of her intact family. This result is not reflective of Congress' reasoned judgment, nor was it contemplated, discussed or intended. It is simply the by-product of "a traditional way of thinking about females" *Califano v. Goldfarb, supra,* 430 U.S. at 223 (Stevens, J., concurring in the result): fathers of intact families are breadwinners while mothers are housekeepers.

This stereotyping has been catastrophic for Appellees and similarly situated female breadwinners. Faced with precisely the same problems and privations as male breadwinners, they and their families are uniformly denied subsistence level assistance simply because of their sex. This result is contrary to the intent of Congress and the holdings of this Court. "Archaic and overbroad" gender-based classifications which are based upon "old notions" or "casual assumptions that women are 'the weaker sex' or are more likely to be childrearers or dependents" violate the Constitution. *Stanton v. Stanton, supra,* 421 U.S. at 14; *Schlesinger v. Ballard,* 419 U.S. 498, 508 (1975); *See Reed v. Reed, supra; Frontiero v. Richardson, supra; Weinberger v. Wiesenfeld, supra; Craig v. Boren, supra; Califano v. Goldfarb, supra* (plurality opinion of Mr. Justice Brennan); *Califano v. Webster,* 430 U.S. 313 (1977). This Court struck down a similar assumption at issue in *Weinberger v. Wiesenfeld, supra,* 420 U.S. at 643 "that male workers' earnings are vital to the support of their families while the earnings of female wage earners do not significantly contribute to their families' support". Precisely the same kind of assumption is operative in §407. Social welfare programs which denigrate "the efforts of women who do work" are constitutionally intolerable and cannot be permitted to stand. *Weinberger v. Wiesenfeld, supra,* 420 U.S. at 645.

Appellant Califano's response to this conclusion is to fabricate an artificial and inaccurate description of the goal

of §407, arguing that it was designed to stem the flow of fathers from their intact families. Even were this the purpose of the Act the means used are ineffective and inappropriate. As the District Court in this case pointed out, there are two flaws in Appellant's argument. First it is premised on another old and archaic notion; males are likely to desert their families while females are not. Second, and even more telling, the program, as designed, denies benefits to each and every intact family which is dependent upon the mother for support. The only way these families can qualify for life-sustaining benefits is if one of the adults abandons the family. This invitation to abandonment is squarely in conflict with the goal Appellant Califano contends was intended by the Act. See *Stevens v. Califano,* Jurisdictional Statement, App. 19a-22a.

Appellant further suggests that Congress, in fixing the parameters of §407, did so in order to save money[12]. This Court's response to arguments concerning cost savings has been consistent. Where programs have obtained savings "by invidious distinction[s] between classes of . . . citizens"

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12. Appellant's cost estimates and cost arguments made their very first appearance in this case in footnote 6 of the Jurisdictional Statement in *Califano v. Westcott.* These arguments seem inconsistent with arguments he advanced in the District Court. There Appellant indicated that the total federal funding for the AFDC-U program as constituted in 1976 was $588,000,000 per year on behalf of 147,000 needy families in 28 states. (Appellant Califano's brief supporting his Motion for Summary Judgment in the District Court, p. 11). The Appellant would have this Court believe that the Order of the District Court, if applied nationwide, would almost double the costs of the AFDC-U program. Such figures, if accurate, are dramatic evidence that §407 is not rationally related to the goal of meeting the needs of families where the *breadwinner* is unemployed, but rather meets the needs of only those families where the *fathers* are unemployed.

In contradistinction to Appellant's calculations stand the assertions of Defendant Creasy that the class which Appellees were seeking to represent in this action consisted of a total of 6 or 7 families. Order, *Stevens v. Califano,* C77-103A, (N. Ohio, Nov. 11, 1977), p. 4 (certifying proceedings as a class action).

those programs have been invalidated on equal protection grounds. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974); *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972); *See also, Frontiero v. Richardson, supra*, 411 U.S. at 688-689; *Reed v. Reed, supra*, 404 U.S. at 76; *Califano v. Goldfarb, supra*, 430 U.S. at 204-205 (plurality opinion of Mr. Justice Brennan); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *NWRO v. Cahill*, 411 U.S. 619 (1973).

The foregoing analysis makes clear that the resolution of this case by the District Court was correct. In light of this Court's rulings in *Reed v. Reed; Stanton v. Stanton; Frontiero v. Richardson; Craig v. Boren* and *Weinberger v. Wiesenfeld*, gender-based classifications which do not bear a substantial relation to the objective of a piece of legislation and which treat similarly situated men and women dissimilarly cannot withstand scrutiny. As previously discussed, the gender-based classification at issue here does not bear a substantial relation to the goal of the AFDC-U program and bars employed women and their families from benefits received by employed men and their families. It must therefore fail. This proposition has been recognized by all courts which have reviewed the constitutionality of §407. In this case, in *Westcott v. Califano* and in *Browne v. Califano*, §407 was held unconstitutional. In not one instance has a contrary result been reached.

CONCLUSION

From the foregoing it is manifest that the instant case presents no substantial question not previously decided by this Court. The rulings of the lower courts are in accord. This case, therefore, is an appropriate one in which to affirm

the decision below or, in the alternative, to dismiss the appeal.

The constitutional question urged for reversal has been so plainly foreclosed by prior decisions of this Court as to make plenary review in this case unnecessary. Recent decisions of this Court, especially *Weinberger* and *Frontiero* have so clearly settled the federal constitutional question arising in statutes, such as §407, so as to obviate any need for plenary review. The legslative history of §407 clearly indicates that Congress was attempting to alleviate the harsh financial and social effects caused by the unemployment of the family breadwinner and inserted the sex-biased term "father" in the 1968 amendments to eliminate families wherein the primary wage earner was fully employed. The statutory sex discrimination complained of herein bears no relation to the objectives of the legislation and fails to satisfy even a "rational relationship" test.[13] Finally, Appellants have raised no new arguments justifying sex discrimination in §407 that have not previously been considered and rejected by this Court.

However, should this Court choose to note probable jurisdiction the present case ought to be heard rather than held in abeyance as suggested by Appellant Califano. The validity of §407 is squarely raised in the present proceeding. The record in this case contains all of the facts necessary for adjudication of this issue. In no other case is the question of the deprivation worked by §407 so directly at issue. Pennsylvania and Massachusetts have pro-

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13. It is irrational to distinguish between mothers and fathers when the sole question is whether needy families with children who have lost the financial support of the family breadwinner due to unemployment should be assisted. *Weinberger v. Wiesenfeld, supra* (concurring opinion of Mr. Justice Rehnquist).

vided virtually equivalent benefits to those individuals injured by §407. That has not been the case in Ohio.

Respectfully submitted,

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